(1)

Supreme Court, U.S.
FILED

03 848 DEC 9 2003

OFFICE OF THE CLERK

No. 03-____

IN THE

Supreme Court of the United States

LAN LAN WANG, PETITIONER

v.

RANDY A. DANIELS, SECRETARY OF STATE,
STATE OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

LAN LAN WANG
Petitioner Pro Se
11 West 25th Street, 10th Floor
New York, NY 10010
(212) 328-0444

70 pp

QUESTIONS PRESENTED

Under New York law, separate licenses are required for real estate brokers and "apartment information vendors" (AIVs). The New York Secretary of State suspended Petitioner's real estate broker's license after he determined she was operating an unlicensed AIV. Under New York Real Property Law, violations of the AIV statute are subject to criminal prosecution by the attorney general, while the Secretary's civil jurisdiction is limited to existing licensees and applicants. Despite the fact the attorney general never prosecuted Petitioner for running an AIV, the Secretary summarily concluded Petitioner's business was in fact an AIV, and cited that as the sole ground for holding Petitioner "untrustworthy" to hold a real estate broker's license. This case presents the following questions:

1. Whether the New York Secretary of State's suspension of Petitioner's real estate broker's license violated the Due Process Clause of the Fourteenth Amendment.

2. Whether the Apartment Information Vendor law, as applied to Petitioner and her business, violates the First Amendment under this Court's commercial speech precedents.

3. Whether the courts below erred in refusing to adjudicate Petitioner's constitutional challenge to New York's Apartment Information Vendor law for lack of standing.

BEST AVAILABLE COPY

TABLE OF CONTENTS

Questions Presented i
Table of Contents ii
Table of Authorities iii
Opinions Below 1
Jurisdiction 2
Constitutional and Statutory Provisions Involved 2
Statement of the Case 2
Reasons for Granting the Petition 9

I. The proceedings below violated Wang's right to due process because the Secretary lacked the authority to summarily find her guilty of violating the AIV law.... 10

II. The application of the AIV law against Wang violates the First Amendment under this Court's commercial speech precedents. 17

III. Summary reversal is warranted because the lower court's holding that Wang lacked standing to challenge the constitutionality of the AIV law, as applied to her, is clearly erroneous. 23

Conclusion 25
Appendix A 1a
Appendix B 2a
Appendix C 4a
Appendix D 12a
Appendix E 16a
Appendix F 23a
Appendix G 30a

TABLE OF AUTHORITIES

Cases:

Central Hudson Gas & Elec. Co. v. Public Svc. Comm'n,
447 U.S. 557 (1980).....18, 19
Galaxy Rental Service, Inc. v. New York,
452 N.Y.S.2d 921 (N.Y. App. Div. 1982).....19
Matter of Eich v. Shaffer,
523 N.Y.S.2d 902 (N.Y. App. Div. 1988).....10
Matter of Fogel v. Dep't of State,
619 N.Y.S.2d 104 (N.Y. App. Div. 1994).....10
Matter of Grant Realty v. Cuomo,
396 N.Y.S.2d 524 (N.Y. App. Div. 1977).....11
Matter of Kostika v. Cuomo,
41 N.Y.2d 673 (1977).....11
Matter of Schimkus v. Shaffer,
532 N.Y.S.2d 564 (N.Y. App. Div. 1988).....11
Railroad Comm'n of Texas v. Pullman Co.,
312 U.S. 496 (1941).....8
Valley Forge College v. Americans United,
454 U.S. 464 (1982).....23
Virginia Pharmacy Bd. v. Virginia Citizens Consumers Council,
425 U.S. 748 (1976).....18
Wang v. Daniels,
798 N.E.2d 349 (N.Y. 2003).....1, 16
Wang v. Daniels,
757 N.Y.S.2d 857 (N.Y. App. Div. 2003).....1
Wang v. Pataki,
164 F. Supp. 2d 406 (S.D.N.Y. 2001).....8, 9, 24

Constitution, statutes, and regulations:

U.S. Const. Art. I, § 8.....8
U.S. Const. Amend. 1.....*passim*
U.S. Const. Amend. 14.....2
N.Y. C.P.L.R. 78.....7

N.Y. Real Prop. Law, art. 12-A.....*passim*
N.Y. Real Prop. Law, art. 12-C:
§ 446-a.....3
§ 446-b.....3
§ 446-e.....12
§ 446-h.....4, 11
N.Y. Comp. Codes R. & Regs. tit. 19, § 190.8.....18

Miscellaneous:

Braden Cox, *Real-Time Dragnet*, NATIONAL REVIEW ONLINE, (May 6, 2003).....20
Ted Cruz, *Testimony before House Subcommittee on Commerce, Trade, and Consumer Protection* (Sept. 26, 2002) (available at www.ftc.gov).....22
Federal Trade Commission, *Memorandum of Law as Amicus Curiae, Powers v. Harris* (Aug. 29, 2002) (available at www.ftc.gov).....22
New York Department of State, *Legal Memorandum 105* (available at www.dos.state.ny.us).....5, 14
N.Y. Governor's Bill Jacket, L. 1975, ch. 772.....3, 15
Alexander F. Treadwell, Letter to Roy M. Goodman.....6, 21
USA Today, *Realtors err in efforts to horde high commissions* (November 11, 2003).....22
Greg Wilcox, *Computer-realty flak reaches DOJ*, L.A. DAILY NEWS (November 15, 2003).....22
Todd R. Zywicki, *Testimony before House Subcommittee on Commerce, Trade, and Consumer Protection* (October 20, 2003).....22

IN THE

Supreme Court of the United States

No. 03-____

LAN LAN WANG, PETITIONER

v.

RANDY A. DANIELS, SECRETARY OF STATE,
STATE OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Lan Lan Wang, acting *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the New York Supreme Court, Appellate Division, First Department, in this case.

OPINIONS BELOW

The order of the New York Court of Appeals denying discretionary review (App., *infra*, 1a) is reported at 798 N.E.2d 349, 100 N.Y.2d 511 (2003). The opinion of the Supreme Court of New York, Appellate Division, First Department (App., *infra*, 2a-3a) is reported at 757 N.Y.S.2d 857, 2003 N.Y. App. Div. LEXIS 5256. The opinion of the Supreme Court of New York, New York County (App., *infra*, 4a-11a), is unreported. The New York Secretary of State's opinion deciding the Petitioner's administrative appeal

(App., *infra*, 12a-15a), and the decision of the Department of State's administrative law judge (App., *infra*, 16a-22a), are unreported.

JURISDICTION

The opinion of the Supreme Court of New York, Appellate Division, First Department, was entered on May 8, 2003. The order of the New York Court of Appeals denying Petitioner's motion for leave to appeal was entered on September 11, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech." The Due Process Clause of the Fourteenth Amendment provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." The relevant provisions of New York State Real Property Law are set forth at App., *infra*, 23a-29a.

STATEMENT OF THE CASE

This case concerns an important and novel federal Constitutional question that requires this Court's attention. The Secretary of State of New York, Randy A. Daniels, suspended the real estate broker's license of the Petitioner, Lan Lan Wang, based on Wang's refusal to comply with a state law requiring separate licensure of businesses that furnish information about the availability and location of rental apartments. In doing this, the Secretary violated Wang's right to due process under the Fourteenth Amendment, because she was never permitted to challenge the basis for the license's suspension. Furthermore, the Secretary's misapplication of the law violated Wang's right

to disseminate truthful, non-misleading commercial speech under the First Amendment and this Court's precedents. Because the Secretary's actions effectively prevent Wang from providing a lawful service that substantially affects interstate commerce, and because none of the courts below would address the merits of Wang's constitutional claims, this Court should grant certiorari.

1. The State of New York makes it illegal for anyone to act as an "apartment information vendor" (AIV) without first obtaining a license from the Department of State (DOS). N.Y. REAL PROP. Law, art. 12-C, § 446-b. An AIV is an individual or company which, for an advance fee, "furnish[es] information concerning the location and availability of real property, including apartment housing."[1] *Id.* § 446-a(2). The AIV license is separate from New York laws requiring licensure of real estate brokers. *See* REAL PROP. LAW, art . 12-a.

The AIV law was enacted in 1975 after the state legislature determined there was substantial fraud in the industry. Individuals and businesses were selling hard-copy lists that contained unavailable or non-existent apartments. The law regulates only rental apartments, not units for sale, such as cooperatives and condominiums. *See* N.Y. GOVERNOR'S BILL JACKET, L. 1975, ch. 772. Accordingly, the AIV law requires not just licensing, but imposes substantial restrictions on the business practices of licensees:

- AIVs must obtain all listings in writing from landlords prior to distribution[2];
- AIVs may not advertise specific properties, only a general listing service;

---

[1] This applies only to apartments that are rented or leased, not "for sale" units.

[2] The AIV law only applies to listings obtained from landlords, not those obtained from licensed real estate brokers.

- All but $15 of any advance fee must be refunded on request;
- All AIVs must maintain paper copies of contracts and escrow agreements; and
- All AIVs must maintain escrow accounts and abide by many reporting requirements.

Each separate violation of the AIV law is a misdemeanor criminal offense subject to prosecution by the New York attorney general's office, with a maximum fine of $5,000 per infraction. *Id.* § 446-h.

2. Petitioner, Lan Lan Wang, is a licensed real estate broker who serves as the CEO and representative corporate broker for Principal Connections Limited (PCL), which she founded in 1993. PCL's business focuses on rental and for-sale properties in Manhattan, and its customer base includes individuals inside and outside New York State, as well as landlords and real estate brokers based in New York City.

In many real estate markets, brokers pool their exclusive listings into a multiple listing service (MLS) that enables each broker to share listings with all other brokers in the MLS. New York City was one of the few markets to lack a traditional MLS, because the market's high demand and low supply made it more profitable for brokers to close deals without sharing their exclusive listings. New York City's unique supply-demand circumstances also meant renters, rather than landlords, pay the broker's commission, typically 15% of the first year's rent for finding an apartment. This commission is paid even when the apartment was openly listed, meaning the renter could have found it without the broker's assistance.

PCL's business model created a more efficient middleman. While providing traditional brokerage services to consumers —such as giving advice, negotiating commissions, and completing lease applications—PCL also developed an MLS.

But rather than provide a traditional MLS, which only exchanges listings among brokers, PCL's service allowed all parties (consumers, landlords, and brokers)[3] to exchange listings and communicate with each other over the Internet. For a one-time fee of $149, individual customers could access PCL's suite of integrated services, including both offline brokerage services and participation in the online MLS.[4] Consumers could also register online for a free guest account that allowed them to preview PCL services.

PCL has never been an "apartment information vendor" as defined by the AIV law. According to a legal memorandum issued by the Secretary, an AIV is a business that exclusively sells lists: "The principal difference between a broker and an apartment listing service is that the listing service generally offers nothing more than the list; it will not provide advice or negotiate with the landlord a client, as would a broker." NYS Dep't of State, Legal Memorandum L105.[5] PCL provides advice and performs brokerage services including negotiating leases or commissions. PCL's competitive advantage, however, stems from integrating its brokerage services with an Internet-based open MLS.

3. Upon learning of the AIV law in 1995, Wang contacted the DOS to note her concern that the law, if applied to PCL, would impose substantial burdens on PCL's business that had little, if anything, to do with protecting consumer welfare. Based on the initial discussions with DOS, Wang believed that PCL's multi-service business was not subject to the AIV law's provisions.

---

[3] More than 2,000 Manhattan brokers also participated in PCL's MLS service, paying a monthly fee to list and search properties and interact with customers, other brokers, and PCL.

[4] While sharing a centralized database and platform, PCL offered three custom web interfaces: www.MLX.com for individual consumers, www.landlordsnyc.com for landlords, and www.brokersnyc.com for brokers.

[5] Available online at http://www.dos.state.ny.us/cnsl/apthunt.html.

Then-Secretary of State Alexander Treadwell[6] (the Secretary), writing to a New York state senator in 1995, stated: "I agree with Ms. Wang that the [AIV] law is onerous and should be amended. I would be pleased to assist you in fashioning a legislative solution to this problem."[7] The Secretary's statement concurred with Wang's view that the AIV law, applied literally, would make it impossible for Wang to profitably operate PCL's interactive services.

4. Despite the Secretary's 1995 statement and the lack of any consumer complaints against Wang or PCL, the DOS issued an administrative complaint in 1999 against Wang as PCL's representative broker. The complaint sought revocation of Wang's real estate broker's license under Article 12-A of the Real Property Law.[8] The sole ground stated by the complaint was that Wang demonstrated "untrustworthiness and incompetence" by "engaging in the business of apartment information vendor without a license." The complaint cited no other grounds for revoking Wang's broker's license aside from the alleged violation of the AIV law.[9]

Before a DOS administrative law judge, Wang argued PCL's business did not constitute an "apartment information vendor" under the statute. Wang also claimed applying the AIV law to her violated the First and Fourteenth Amendments to the Constitution. The ALJ rejected Wang's claims, and found that "[b]y operating an unlicensed

---

[6] In April 2001, Treadwell was succeeded by Randy A. Daniels.

[7] Letter from Alexander F. Treadwell, Secretary of State, to Roy M. Goodman, New York State Senate 2 (April 5, 1995).

[8] Throughout this petition, "Article 12-A" refers to the law governing real estate broker's licenses, and the proceedings against Wang therein. The AIV law falls under Article 12-C.

[9] Under the Real Property Law, a corporation that engages in brokerage services must employ an individually licensed broker. For practical purposes, revocation or suspension of Wang's individual license also prevents PCL from providing brokerage services.

Apartment Information Vendor business," Wang had "demonstrated untrustworthiness and incompetence as a Real Estate Broker." App., *infra*, 22a. Without rendering any decision against PCL, the ALJ ordered Wang's broker's license suspended "until such time as she has presented proof satisfactory to the Department of State that she, either directly or through any business controlled by her, is no longer engaged in the business of Apartment Information Vendor." The ALJ refused to consider Wang's constitutional challenge, stating, "The respondent seeks to have this tribunal rule on the constitutionality of the statute. This tribunal lacks the authority to do so" (citations omitted). *Id.*

4. Wang appealed the ALJ's decision to the Secretary, who affirmed. The Secretary found that "the Department of State may suspend a real estate broker's license for activities unrelated to the license itself," and that the ALJ properly determined Wang "did conduct an unlicensed apartment information business." App., *infra*, 14a. In the Secretary's view, Wang's "knowing and persistent refusal" to comply with the AIV law constituted sufficient grounds for determining her untrustworthy under Article 12-A. *Id.* at 15a. Regarding Wang's constitutional claims, the Secretary found "[t]he authorities cited in the [ALJ's] Decision support the conclusion that the Office of Administrative Hearings has no jurisdiction to determine the constitutionality of the apartment information vendor statute." *Id.* at 13a-14a.

5. Wang next initiated a judicial review proceeding under N.Y. C.P.L.R. 78 (hereinafter the "Article 78 proceeding") to overturn the Secretary's decision. Wang's petition challenged the constitutionality of the AIV law under the First, Fifth, and Fourteenth amendments, as well as the Commerce Clause. The case was initially heard in the Supreme Court of New York, New York County, but was transferred by that court's order to the Appellate Division, First Department. App., *infra*, 4a-11a.

Before the Appellate Division, Wang renewed her constitutional challenge to the AIV law as applied to her by the Secretary. But the Appellate Division, without citing any authority, found Wang lacked standing to pursue such claims. The court found the suspension of Wang's license was solely due to violating Real Property Law Art. 12-A, the broker licensing statute, *not* for any violation of Article 12-C, the AIV law. Thus, the Secretary's decision was affirmed. App., *infra*, 2a-3a.

7. Concurrent to the Article 78 proceeding, Wang and PCL filed suit in the U.S. District Court for the Southern District of New York against New York Governor George Pataki and Attorney General Eliot Spitzer, both in their official capacities.[10] Wang asked the district court to enjoin enforcement of the AIV law on three grounds: that it violated the Commerce Clause, U.S. Const. Art. I, § 8; that it banned speech protected by the First Amendment; and that it was "unconstitutionally vague" under the First, Fifth, and Fourteenth Amendments.

The district court abstained from deciding Wang's constitutional claims. *Wang v. Pataki*, 164 F. Supp. 2d 406 (S.D.N.Y. 2001). Citing this Court's holding in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the district court found abstention was appropriate because "the AIV is susceptible to interpretation by a state court that would avoid constitutional adjudication and the currently pending state court proceedings are adequate to address the issue." 164 F. Supp. at 412. In a footnote, the court noted the unusual nature of the Secretary's actions against Wang:

> This action is particularly appropriate for abstention because of the *oblique effort* of the Secretary of State to enforce the AIV. Rather

---

[10] The district court dismissed Governor Pataki as a defendant, but maintained the claims against Attorney General Spitzer.

> than a direct action against Wang and MLX.Com for violating the AIV, the Secretary determined that Wang had violated the AIV and that such violation constituted grounds for suspension of her license as a real estate broker. *Id.* at 411, n1 (italics added).

7. Wang sought leave to appeal the Appellate Division's decision to the New York Court of Appeals, raising her constitutional challenges for a fifth time. Specifically, she presented the question, "[d]oes the Apartment Information Vendor ("AIV") Law violate the First, Fifth and Fourteenth Amendments of the Constitution?" The Court of Appeals denied leave to appeal without comment. App., *infra*, 1a.

REASONS FOR GRANTING THE PETITION

Wang was deprived of her property—her real estate broker's license—for failing to comply with the AIV law, a statute that is inapplicable to her business. Despite the lack of any evidence of actual fraud or consumer harm resulting from the actions of Wang or PCL, the Secretary exercised his authority under the guise of protecting consumers from an "untrustworthy" broker. But the Secretary's conclusion was based on his application of the AIV law. Under that law, however, the Secretary cannot summarily punish violators; that function is vested with the criminal courts upon complaint of the Attorney General. When Wang raised a federal constitutional challenge to the Secretary's actions, her claims were dismissed by the state courts below without consideration on the merits. The Secretary played an elaborate shell game. At the same time, the federal district court in *Pataki* abstained from deciding Wang's constitutional challenge because it anticipated a decision on these issues from the state courts. Thus, there has never been *any* decision by any tribunal of competent jurisdiction on Wang's constitutional claims.

The decisions below repeat the same errors: They found Wang lacked standing to challenge the constitutionality of the AIV law as applied to her; they failed to protect Wang's due process rights under the Fourteenth Amendment; and they refused to hold the AIV law's application to Wang violated this Court's precedents regarding commercial speech regulation. Because the courts below refused to adjudicate Wang's timely constitutional claims, this Court at a minimum should grant certiorari and summarily reverse the decision below, and remand for an adjudication on the merits. Alternatively, the Court should directly address the important constitutional issues presented.

I. The proceedings below violated Wang's right to due process because the Secretary lacked the authority to summarily find her guilty of violating the AIV law.

The district court correctly described the Secretary's revocation of Wang's broker's license as an "oblique effort" to enforce the AIV law. App., *infra*, 38a. The New York courts, however, didn't see it that way. The Appellate Division found that Wang's "defiance" of the AIV statute alone, without any alleged misconduct related to her real estate business, justified the Secretary's decision. *Id.* at 3a. The only authority cited by the court in support of this conclusion was *Matter of Fogel v. Department of State*, 619 N.Y.S.2d 104 (N.Y. App. Div. 2nd Dept. 1994). *Fogel* did indeed hold that Article 12-A "does not specifically limit a finding of untrustworthiness to only those situations where the underlying acts or conduct are connected to real estate transactions," *Id.* at 105; this does not, however, tell the whole story.

In 1993, the Secretary denied Kevin Fogel's application to renew his real estate broker's license because of Fogel's "prior criminal conviction for sexual misconduct." *Id.* Other authorities cited in *Fogel* present similar situations. For example, in *Matter of Eich v. Shaffer*, 136 A.D.2d 701 (1988),

the Secretary properly revoked a broker's license after his insurance license was previously revoked for failure to satisfy a judgment.[11]

While Wang does not challenge the propriety of *Fogel*, she does challenge the Secretary's attempt to short-circuit *Fogel*'s central holding: The Secretary may suspend or deny a broker's license for untrustworthiness *after* a preceding tribunal finds the licensee guilty of a civil or criminal offense. Here, however, the Secretary *simultaneously* decided Wang committed a *criminal* offense—violation of the AIV law—and that she was thus untrustworthy. Neither the AIV statute nor *Fogel* permit this outcome, because the Secretary lacked the authority to decide whether Wang violated the AIV law in the context of an Article 12-A proceeding.

Any violation of the AIV law is a criminal misdemeanor. The statute vests exclusive criminal enforcement power with the attorney general, not the secretary of state. N.Y. REAL PROP. LAW § 446-h(2). The Secretary's authority is limited to civil investigations of individuals and businesses "applying for or holding a license as" an AIV. *Id.* § 446-h(4). The Secretary may revoke or deny AIV licenses, similar to Article 12-A's procedures regarding broker's licenses. *Id.* § 446-e. Nowhere does the AIV law grant the Secretary or his department any power to prosecute or investigate unlicensed persons illegally acting as AIVs; that power belongs solely to the attorney general.

This explains the Secretary's failure to render a decision against PCL as a respondent in the Article 12-A proceeding

---

[11] Most of the case law *Fogel* relies on, however, deals with conduct directly arising from a broker's actions within the real estate business. *See Matter of Kostika v. Cuomo*, 41 N.Y.2d 673 (1977) (license revoked for failure to return funds defrauded from client); *Matter of Schimkus v. Shaffer*, 532 N.Y.S.2d 564 (2nd Dep't 1988) (license revoked for racially discriminating against clients); *Matter of Grant Realty v. Cuomo*, 58 A.D.2d 251 (1st Dep't 1977) (license revoked for incompetence related to a real estate sale).

against Wang; the Secretary clearly understood he lacked jurisdiction over PCL's actions. The attorney general could have, at the Secretary's suggestion, filed criminal charges against PCL or Wang individually. The attorney general's failure to do so speaks volumes about the Secretary's case against Wang. Specifically, it speaks to the lack of any evidence Wang harmed consumers, committed fraud, or engaged in other acts that would provide a rational basis for revoking her broker's license. The best the Secretary could muster was that Wang refused to obtain an AIV license; yet neither the Secretary nor the attorney general saw cause to prosecute Wang's allegedly illegal AIV.

Due process, at a minimum, requires that the law be sufficiently clear as to what conduct is prohibited, and the procedures by which violations are adjudicated. Here, the Secretary disregarded the statutory procedure, performed an end-run around the attorney general, and claimed for himself the authority to punish a real estate broker for running an allegedly unlicensed AIV. This denied Wang the right to defend herself in the correct forum, because the Article 12-A proceeding had no authority to decide whether PCL was in fact an AIV.

While this is first and foremost a state case, the decisions below upholding the Secretary's actions violate the federal constitutional rights of Wang under the Due Process Clause. Suspending Wang's broker's license because of PCL's Internet activities restricts her ability to engage in interstate commerce. After all, PCL's website and services were available to any Internet user outside of New York. Because the Secretary used an improper procedure to suspend Wang's license, the due process violations discussed above raise significant issues demanding this Court's attention.

The Secretary's key error, as discussed throughout the previous proceedings, is his misguided effort to expand the definition of "apartment information vendor" well beyond the statute's intent and plain meaning. The Secretary

compounds this error by *arbitrarily* applying this broad definition to Wang's PCL, but not to other businesses that fall under the literal meaning of the AIV law. For example, Wang argued below that Village Voice Media, a New York-based newspaper publisher, has sold access to apartment listings via the Internet since 1998, charging $10 per week for its "Voice 1st CLASSifieds" service. Like PCL, Village Voice is not a licensed AIV, yet neither the Secretary nor the attorney general prosecuted Village Voice for its apparent violation of the law. Another company, America Online, charges a monthly fee for bundled access to its Internet service, which allows consumers to access real estate listings that provide location and availability, yet AOL has not been cited for violating the AIV law, despite offering its services within New York. And no traditional multiple listing service—the principal business of which is to "furnish information concerning location and availability of property"—has ever been required to obtain an AIV license.

Wang has maintained all along that PCL, a licensed real estate broker, provides services that include access to information on a multi-party, multi-directional, multi-frequency basis rather than mere information or lists of information. The AIV law was enacted to deal with the latter, not the former. The Secretary implicitly acknowledges this by permitting Village Voice, America Online, and traditional multiple listing services to provide services akin to PCL's without being subject to the same licensing requirements. The Department of State's administrative law judge tried to justify this disparate treatment by distinguishing AIVs from other information sellers, such as newspapers:

> Unlike a newspaper, in which the reporting of news is the primary function and apartment rental advertisements, placed by a landlord or broker for a fee, are only a secondary function, the primary function of the

> respondent's business, and the source of her revenues, is the sale of access to listings of apartments which are available for rent. The fact that her service is electronic and interactive, or that she refers to it as a "portal," in no way changes the essence of what she is selling. Nor does the fact that the apartment information is in data base form rather than in a written list, a change of form rather than of substance, exempt from the coverage of the statute. App., *infra*, 20a (citations omitted).

The AIV law does not distinguish vendors based on the "primary function" of their businesses; if that were the case, Wang might claim exemption on grounds that she is principally a licensed real estate broker. But that argument would still miss the point: Wang *never* operated an AIV in the first place. PCL's Internet-based open MLS was not a "written list,"—or any list at all—but rather part of an integrated *real estate brokerage* service. The Secretary's own Legal Memorandum 105 acknowledges that an AIV "generally offers nothing more than [a] list; it will not provide advice or negotiate with the landlord or client, as would a broker." PCL provided precisely these non-AIV services as well as access to an open MLS; none of these services falls under the statutory definition of an AIV.

But here the Secretary manipulates the definition of an AIV to exclude just about everyone *except* Wang: An MLS is not an AIV, except when it's accessible by the general public; and an AIV is an AIV, except when the AIV has another "primary function." The purpose of these contradictions is clear: Any attempt to regulate established businesses, such as newspapers and traditional multiple listing services, under the AIV law would raise serious constitutional issues. But Wang is entitled to no lesser amount of constitutional protection simply because PCL uses an innovative business

model that defies traditional industry and statutory categorization.

Even if the "primary function" rationale justified the Secretary's actions, PCL's business model still does not meet the statutory definition of an AIV. In enacting the AIV law, the legislature's principal concern was that consumers paid advance fees to vendors who, in turn, provided inaccurate, outdated, and fraudulent apartment lists. In some cases, vendors simply copied apartment listings from newspapers and resold them as original compilations. *See* GOVERNOR'S BILL JACKET, L. 1975, ch. 772. PCL, in contrast, operated a real-time, constantly updated Internet database where renters, owners, landlords, and brokers directly interacted. More importantly, PCL consumers could access information on the location and availability of rental apartments *without* paying an advance fee, as Wang explained to the New York Court of Appeals:

> PCL does not require customers to pay until *after* they are satisfied with the information they have received. The company empowers users to search for information on only the types of apartments in which they are interested and to view on-line summaries of that information *before they pay any money at all*. Users simply have to register with the service as "guests" and are permitted to search the database free of charge for apartments that meet their criteria: for instance, neighborhood, number of bedrooms, and price, to name just a few. The free service then provides them with a matched set of apartments that meet their criteria, which they can view in various forms. It is only *after* a customer decides that he or she is satisfied with the "information" that they are required to pay the membership

> fee, at which point they receive access to PCL's broker services, consultation, specific address of apartments and contact information - on a continuing basis until they find an apartment.[12]

The "advance fee" requirement is central to the AIV law's mandate. Distributing apartment information for free does not require a license in New York; nor do licensed real estate broker's require an AIV license to provide brokerage services. PCL's guest account program effectively distinguishes it from an AIV, because consumers can access location and availability information without paying an advance fee. Thus, Wang correctly concluded she did not require an AIV license for PCL. The Secretary disagreed. But once again, rather than follow the correct procedure for prosecuting an unlicensed AIV—criminal proceedings initiated by the Attorney General—the Secretary improperly targeted Wang's broker's license. Had Wang been the CEO of Village Voice or AOL rather than a real estate broker, the Secretary likely would not have targeted her for prosecution at all.

Due process is violated whenever the government arbitrarily or capriciously applies a law beyond its stated objective. In such circumstances, a defendant cannot know *in advance* that her actions are illegal. Despite the Secretary's prior admonitions to Wang to obtain an AIV license, the fact remains the Secretary enforces the AIV law in an arbitrary and capricious manner. Wang could not, with reasonable certainty, understand whether PCL was an AIV, because the Secretary exempted businesses that were more akin to an AIV under the law's provisions.

---

[12] Motion for Leave to Appeal at 32-33, *Wang v. Daniels*, 798 N.E.2d 349 (N.Y. 2003) (Mo. No. 732) (citations omitted).

Finally, the Secretary's prior demands for Wang to obtain an AIV license masks yet another problem with the law: It is impossible to comply with in practice. In the courts below, Wang demonstrated how the AIV law's regulatory requirements make it impossible to run a business consistent with the letter of the law—a point conceded by the Secretary in his 1995 letter to the state legislature, as well as by the ALJ in the proceedings below.[13] Most licensed AIVs currently disregard these requirements with the Secretary's tacit approval. Wang, in contrast, refused to obtain an unnecessary license under terms she could not reasonably comply with. The Secretary thus prosecuted Wang for failing to intentionally defraud the state and break the law. This presents a novel due process conundrum worthy of this Court's attention.

II. The application of the AIV law to Wang violates the First Amendment under this Court's commercial speech precedents.

The Secretary's suspension of Wang's broker's license requires her to affirmatively demonstrate that she no longer owns or runs an AIV (as defined by the Secretary) before her license may be reinstated. App., *infra*, 22a. Wang's earlier refusal to obtain an AIV license arose, in part, from her view that the AIV law imposed unconstitutional restrictions on her First Amendment right to engage in commercial speech. This creates a dilemma: If Wang complies with the Secretary's order, she accepts censorship of constitutionally

---

[13] During the DOS administrative hearing, the ALJ stated, "I understand and I agree with you operating under [the AIV law]. It is extremely onerous and possibly impossible" to comply with. Minutes of Hearing at 83, *Division of Licensing Services v. Wang* (July 27, 1999). The ALJ went on to add, "I can tell you, because I remember Mario Cuomo was secretary of state and a few of the people working on it, their idea was to prevent the public from being ripped off that there were a lot of crooks out there, and that was the purpose of the statute * * * It didn't work out that way the first time and subsequently it probably hasn't worked out again." *Id.*

protected speech; but had Wang complied with the Secretary's initial request to license PCL as an AIV, the statute's ban on advertising specific properties would also violate her speech rights under the First Amendment. In either case, the courts below failed to properly consider this issue, making action by this Court timely and necessary.

The Secretary's regulations implementing the AIV law forbid a licensed vendor from placing "any advertisements for specific apartments." Instead, "[a]dvertisements shall be limited to the vendor's name, address, telephone number and business hours, and a description of the services offered." N.Y. COMP. CODES R. & REGS. tit. 19, §190.8. This regulation makes it impossible for AIVs to present consumers with truthful information about available apartments. It renders PCL's services effectively worthless. PCL was designed to function as a customer-accessible multiple listing service; this does nothing more than give consumers parity to brokers in viewing the exact same information. Yet the AIV law declares this illegal in the name of advancing the state's interest in preventing potential fraud by vendors.

The First Amendment protects commercial speech; that is, "speech which does no more than propose a commercial transaction." *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 762 (1976). Wang admits information regarding the location and availability of apartments constitutes commercial speech. While this speech is subject to government regulation, this Court's precedents make it clear such regulation must meet certain criteria to withstand First Amendment scrutiny. In *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1982), the Court articulated a four-part test: First, the speech at issue must concern "lawful activity" and not be misleading; second, the government must assert a "substantial" interest in regulating the speech; third, the regulation must "directly" advance the government's asserted interest; and

finally, the regulation must not be "more extensive than is necessary" to serve the government's interest. Failure to meet any of these four tests renders the government's action impermissible under the First Amendment. *Id.* at 566.

In 1982, the New York courts considered the constitutionality of the AIV advertising ban under the *Central Hudson* test. In *Galaxy Rental Service, Inc. v. New York*, 452 N.Y.S.2d 921, the Appellate Division, Fourth Department, issued a preliminary injunction enjoining the advertising ban against a licensed AIV. The Appellate Division found the plaintiff was likely to succeed in obtaining a declaratory judgment from the trial court holding the ban unconstitutional. The court found the advertising ban would likely fail the fourth *Central Hudson* test because the state "has not shown that its interests cannot be advanced by less restrictive means." *Id.* at 925. The court said New York could regulate specific property advertising to protect consumers from fraud, but it could not outright ban all such advertising as a substitute for regulation. *Id.* at 925-926.

Unfortunately, the *Galaxy Rental* case was apparently not prosecuted beyond the Appellate Division's preliminary injunction. There is, to Wang's knowledge, no further proceedings reported in the case; however, the Appellate Division's view of the advertising ban is not contradicted by any subsequent authority, and the courts below in this case did not address Wang's renewed claim on this point.

Beyond the advertising ban, the Secretary's selective prosecution of Wang itself constitutes a First Amendment violation under *Central Hudson*. Since the Secretary never argued Wang presented the public with false or misleading information about apartment availability, the Secretary's Article 12-A action must be viewed as a regulation of Wang's commercial speech. This is consistent with the ALJ's order, as affirmed by the Secretary, requiring Wang to shut down or divest PCL as a precondition of reinstating her

broker's license. The order relates not to Wang's conduct as a broker, but to her commercial speech activities in a different industry.

Applying *Central Hudson* to the Secretary's order, the restriction on Wang's commercial speech fails the third and fourth tests established by this Court. The Secretary's action neither directly advances the state's interest under Article 12-A, nor the AIV law. Even if it did, the broad prohibition on Wang's commercial speech is not narrowly tailored to meet either interest. The Secretary's order has only one purpose: To shut down PCL's multiple listing service. This action outright denies consumers the ability to receive truthful, non-misleading information about a commercial subject, in direct defiance of *Central Hudson* and its progeny.

Prior to PCL, individual consumers in New York City could not directly access a multiple listing service; they had to rely on traditional brokers who charged high commissions for limited access to information. PCL cut prices while expanding access and services. The Secretary has never alleged or demonstrated otherwise. Yet his continued insistence on forcing Wang to shut PCL down reflects a misguided effort to expand a 1975 law's narrow regulatory scheme to reach technological innovations that render the law itself obsolete.

As Braden Cox of the Competitive Enterprise Institute noted earlier this year, the Secretary's case against Wang is more about protecting old business models from competition than it is about protecting consumers:[14]

> The case of [PCL] exemplifies how some old laws simply do not fit when applied to new business models. The apartment information

---

[14] Braden Cox, *Real-Time Dragnet*, NATIONAL REVIEW ONLINE, May 6, 2003 (available at http://www.nationalreview.com/comment/comment-cox050603.asp).

> vendor law is an antiquated relic that has a newfound purpose — protecting the entrenched, deep-pocketed industry that controls the country's most lucrative real-estate market. Ironically, in trying to enforce a consumer protection statute, New York is hurting consumers by enforcing a law that hinders innovation.
>
> Old-economy regulations shield established industries from having to adapt to new and better ways of doing business. All too often, regulators skew the regulatory process in favor of established, "traditional" off-line companies.

There is nothing in the record below that rationally explains how applying the AIV law to Wang and PCL advances New York State's interest in protecting consumers from fraud, misleading information, or "untrustworthy" real estate brokers. Nor is their any evidence that the Secretary narrowly tailored his regulation and enforcement of the AIV law to avoid offending this Court's commercial speech precedents. Even the administrative law judge below acknowledged that the AIV law "is extremely onerous and possibly impossible" to comply with. *See infra* note 13. The Secretary's predecessor echoed that sentiment when he told a New York State senator, "It is my opinion that these statutory requirements make it virtually impossible to carry on the business of apartment information vending * * * I agree with Ms. Wang that the law is onerous and should be amended." *See infra* at 6. Both officials recognized the AIV law for what it is—an unconstitutionally broad restriction of the rights of businesspersons like Wang to provide the public with access to truthful, non-misleading commercial information.

The Secretary's violation of Wang's commercial speech rights presents an important First Amendment issue. In

recent years, state regulatory barriers to Internet-based commerce have come under increasing federal scrutiny. For example, the Federal Trade Commission routinely criticizes state regulations that discriminate against out-of-state businesses that distribute goods and services over the Internet. *See* Todd R. Zywicki, *Testimony before House Subcommittee on Commerce, Trade, and Consumer Protection* (Oct. 30, 2003) (discussing state bans on direct sales of wine over the Internet)[15]; Ted Cruz, *Testimony before House Subcommittee on Commerce, Trade, and Consumer Protection* (Sept. 26, 2002) (discussing state regulations on Internet sales of contact lenses, real estate and financial services, caskets, automobiles, and wine)[16]; Federal Trade Commission, *Memorandum of Law as Amicus Curiae, Powers v. Harris* (W.D. Okla. Aug. 29, 2002) (No. CIV-01-445-F) (discussing state ban on Internet sales of caskets).[17] The FTC's work emphasizes the importance of reducing state regulatory barriers in order to *improve* consumer welfare and encourage the growth of Internet-based commerce. This case presents the related question of whether such state barriers rise to the level of unconstitutional action when commercial speech over the Internet is expressly banned.[18]

While this case deals with a real estate broker licensed and doing business in New York, the Secretary's actions

---

[15] http://www.ftc.gov/os/2003/10/031030ecommercewine.htm

[16] http://www.ftc.gov/os/2002/09/020926testimony.htm

[17] http://www.ftc.gov/os/2002/09/okamicus.pdf

[18] While the FTC has not directly targeted the type of regulatory restraints Wang addresses here, the Department of Justice is investigating the National Association of Realtors for possible antitrust violations stemming from that group's efforts to restrict open MLS and "virtual office" websites similar to those run by PCL. *See* Greg Wilcox, *Computer-realty flak reaches DOJ*, L.A. DAILY NEWS, November 15, 2003 (available online at http://www.dailynews.com/Stories/0,1413,200~21661~1769159,00.html). *See also Realtors err in efforts to horde high commissions*, USA TODAY, November 11, 2003 (available online at http://www.usatoday.com/news/opinion/editorials/2003-11-11-our-view_x.htm).

create a barrier to the interstate flow of commercial speech. Approximately 20% of Wang's individual consumers access PCL's services from outside New York State. The Secretary's effort to restrain Wang's business, therefore, must be scrutinized under this Court's precedents protecting commercial speech. The failure of the New York courts to review Wang's claims must not prevent this Court from providing necessary judicial review.

III. Summary reversal is warranted because the decision below's holding that Wang lacked standing to pursue her constitutional claims is clearly erroneous.

Wang raised the constitutional challenges discussed above on five previous occasions: twice before the Department of State, before the Appellate Division, before the U.S. District Court, and most recently before the New York Court of Appeals. None of these tribunals addressed the merits of Wang's claims, however, forcing her to continue playing a judicial shell game. This Court can end the game by summarily reversing the Appellate Division's holding that Wang lacks standing to proceed with her constitutional challenge before the New York courts.

The Appellate Division cited no applicable authority that denies Wang standing to raise a constitutional challenge to the AIV law. Instead, the Appellate Division simply accepted the Secretary's view that Wang could not raise a constitutional challenge to the AIV law because she did not hold or apply for an AIV license. This completely ignores the fact that the AIV law was the basis for suspending Wang's broker's license, and that a successful challenge to the AIV law's constitutionality would deny the Secretary his only grounds for maintaining that suspension.

The Appellate Division gave the Secretary a blatantly unconstitutional legal advantage over Wang: He is free to cite any basis for revoking or suspending a license, but Wang is precluded from challenging that basis for lack of

standing. This reading of standing is nonsensical, and it makes a mockery of judicial power.

As a general rule, standing "at an irreducible minimum" requires three elements: First, the party has personally suffered "some actual or threatened injury" as the result of the challenged party's conduct; second, the injury can "fairly be traced to the challenged action"; and finally, the injury is "likely to be redressed by a favorable decision." *Valley Forge College v. Americans United*, 454 U.S. 464, 472 (1982). Wang unquestionably satisfies these three requirements. In all of the courts and agencies below, Wang alleged an actual injury—the loss of her broker's license—resulting from the Secretary's enforcement of the AIV law against her. Without the Secretary's finding that Wang violated the AIV law, there was no basis to conclude she was untrustworthy under Article 12-A. By holding the AIV law's application was erroneous or unconstitutional, Wang's injury would be redressed, as the Secretary would be compelled to reinstate her license.

The *Pataki* court, in issuing its Pullman abstention, anticipated state adjudication of Wang's constitutional claims. Citing Second Circuit precedent, the court found "facial constitutional issues could be reached in the State Court setting." App., *infra*, 38a. The Appellate Division's refusal to address the constitutional claims rests solely on its unsupported view that Wang lacked standing. But this creates a paradox: The Pullman abstention was issued because the state courts needed to clarify AIV law's constitutionality; the state courts then ruled the AIV law applied to Wang, but that she couldn't challenge its constitutionality. This is classic context dropping. The Appellate Division believed Wang needed to obtain an AIV license before she could challenge the law. But the necessity of getting the license and complying with its requirements is precisely what Wang is challenging.

Accordingly, this Court should, at a minimum, reverse the decision below and remand with instructions to decide the constitutional issues discussed in this petition. Alternatively, this Court should address the merits of the constitutional issues given the New York courts' unwillingness to interpret the AIV statute in light of Wang's claims. The *Pataki* court's Pullman abstention is moot, because the AIV law is no longer "susceptible to interpretation by a state court" and the federal constitutional issues can no longer be avoided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

LAN LAN WANG
Petitioner Pro Se
11 West 25th Street, 10th Floor
New York, NY 10010
(212) 328-0444

DECEMBER 2003

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

1-10 Mo. No. 732

IN THE MATTER OF LAN LAN WANG, &C.,
Appellant,

v.

RANDY A. DANIELS, &C.,
Respondent.

Filed September 11, 2003

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ STUART M. COHEN
STUART M. COHEN
Clerk of the Court

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Index No. 109389/01

IN RE LAN LAN WANG, ETC.,
Petitioner,

v.

RANDY A. DANIELS, ETC.,
Respondent.

Decided May 8, 2003

Before: Mazzarelli, J.P., Saxe, Williams, Marlow, Gonzalez, JJ.

Determination of the Secretary of State, dated January 4, 2001, suspending petitioner's real estate license for untrustworthy conduct until such time as she stops operating as an unlicensed apartment information vendor, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Paula Omansky, J.], entered December 13, 2001) dismissed, without costs.

The challenged determination is supported by substantial evidence that petitioner's Internet business offered apartment listings and related information for a fee and without a license, in violation of Real Property Law § 446-b,

and that although the Department of State repeatedly warned petitioner over a period of years to obtain a license, she refused to do so based on her own interpretation that the licensing requirement does not apply to apartment information vendors who utilize the Internet. Although such defiance has no direct relationship to petitioner's real estate broker's license, no basis exists for disturbing a respondent's finding that such defiance demonstrates an untrustworthiness within the meaning of the Real Property Law § 441-c(1) warranting suspension of that license (see Matter of Fogel v. Department of State, 209 AD2d 615). Petitioner's challenge to the constitutionality of the informational and account maintenance requirements of section 446-c, on the grounds that they are burdensome and impinge upon her commercial free speech and her ability to engage in interstate commerce, fails for lack of standing. Suspension of petitioner's real estate license, the only injury alleged, was based not on any failure to comply with the requirements of 446-c but on defiance of the licensing requirement of section 446-b.

Entered: May 8, 2003

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
IAS Part 47

---------- X

Index No. 109389/01
ORDER AND JUDGMENT

In the Matter of the Application of
LAN LAN WANG, Real Estate Broker,

Petitioner,

For a Judgment annulling or modifying
her suspension as a licensed real estate broker

- against-

RANDY A. DANIELS, Secretary of State of
the State of New York

Respondent.
---------- X

PAULA J. OMANSKY, J. :

In this article 78 proceeding, petitioner Lan Lan Wang seeks an order reversing and/or setting aside a determination, dated January 31, 2000 made by respondent, after a hearing to suspend petitioner's real estate license in accordance with section 441-c of the Real Property Law.

Respondent Randy A. Daniels, Secretary of State of the State of New York cross-moves, pursuant to CPLR 7804(g) to transfer this proceeding to the Appellate Division, First Department for hearing and determination, or in the event

that this proceedings is not transferred, respondent cross-moves to submit affidavits and memorandum of law opposing the petition within 20 days after service of notice of entry of this order denying the cross motion.

FACTS

Petitioner Wang has been a licenced real estate broker in New York since December 6, 1994. She contends that she is an officer and director of Principal Connections, Ltd. ("Principal Connections") a business located at 44 Park Avenue South, New York, New York. According to petitioner, her brokerage is separate and distinct from her corporation.

In 1996, petitioner commenced operation of an entity known as "Manhattan Listing Express" also known as "Homeline". In return for a registration fee of $175 consumers would receive for a period of three months, listings of apartments which were available for rent in various New York City locations. Originally, all contacts between Manhattan Listing Express/Homeline and its customers were in person, by voice or fax telephone, or by mail. At some point petitioner transferred her operation to the Internet using such names as "Metro Xpress" and MLX."

On February 8, 1999, the Department of State issued a complaint charging petitioner with violations of the Real Property Law on the ground that her business "Principal Connections" was operating as an apartment information vendor without being licensed to do so in contravention of the Apartment Vendors Act, Article 12-C of the Real Property Law and sought to vacate her real estate license. Petitioner was served with a Notice of Hearing dated February 12, 1999. Respondent alleged that petitioner was advertising on the Internet, that she provided apartment information services for a fee, and that petitioner, and her

corporation have never been licensed as an Apartment Information Vendor ("AIV"), as required by law.

A hearing was held on July 27, 1999 before Administrative Law Judge Roger Schneider. In her defense, petitioner argued that MLX is not an AIV because her company does not supply static paper lists but provides a conduit to the most accurate and current services and information available regarding New York and New Jersey residential real estate. According to petitioner, her corporation only sells access to a "bi-directional Internet platform" which permits renters, buyers, sellers, landlord and brokers with common interest to communicate with each other about services and needs. One of the provided services includes information related to rental apartments in New York and New Jersey. Petitioner stated that consumers who access her website are offered, without fee, the opportunity to obtain information about various aspects of the real estate business in the City of New York, including information about taxes, moving practices, and discounts. According to Petitioner, her customers were given an opportunity to participate in an "on-line bulletin board," and to access a data base of apartments which are available for rent or sale. This data base described the apartments which are available for rent, but does not give their addresses or otherwise indicates how to contact the landlords. By paying a fee of $150.00 the consumer receives on-line access to the addresses of and contact information for the rental apartments, as well as discounts from unspecified non-affiliated businesses.

In addition, petitioner argued at the hearing that respondent has no authority to suspend or revoke a real estate broker's license pursuant to an alleged violation of the AIV. Petitioner further claims that the State Attorney General may only enforce the AIV within the parameters of section 446(1) , (2) , and (3) of the Real Property Law. In addition, petitioner argues that respondent improperly

incorporated the AIV provisions of Article 12-C of the Real Property Law (RPL 5 446-a et seq) into section 441-c of the Real Property Law which governs real estate licenses.

In a determination issued January 31, 2000, ALJ Schneider found that section 446-b applied to the matter before him and that petitioner's operation of Manhattan Listing Xpress/Homeline clearly fell within the statutory definition of "Apartment InformationVendor." In addition, ALJ Schneider found that the primary function of petitioner's business and the source of her revenues is the sale of access to listings of apartments which are available for rent.

The ALJ specifically rejected arguments made by petitioner that the governing law only applied to the sale of lists written on paper and did not govern business conducted on the Internet. In addition, the ALJ found that petitioner was engaged in the type of conduct that the statue was designed to regulate, namely the sale of lists of apartments available for rent.

The ALJ also determined that petitioner's failure to obtain the appropriate licenses for her AIV Internet business demonstrated both untrustworthiness and incompetence which warranted suspension of her real estate license. The ALJ revoked petitioner's license effective April 1, 2000 until such time as she had presented proof satisfactory to the Department of State that she, either directly or through any business controlled by her, is no longer engaged in the business of Apartment Information Vendor as defined by General Business Law § 446-a[2].

Petitioner appealed the determination. The administrative appeal was rejected and respondent affirmed the determination of the ALJ in a decision and order dated January 4, 2001. Petitioner then commended this proceeding.

DISCUSSION

In New York, the Department of State may revoke or suspend the license of a Real Estate Broker upon conviction of the license of a violation of Article 12-4 of the Real Property law or "for a material misstatement in the application for such license, or if such licensee has been guilty of fraud or fraudulent practices, or for dishonest or misleading advertising, or has demonstrated untrustworthiness or incompetency to act as a real estate broker" (RPL § 441-c [ll) . The term "untrustworthiness" also includes misconduct in disregard of law and public policy (Smith v Paterson, 88 AD2d 917 [:2d Dept 1982] Dioma v Lomenzo, 26 AD2d 473, 477 [lst Dept 1966]) .

Section 441-f of the Real Property Law provides that actions taken by respondent to revoke a license, impose a fine or issue a reprimand to a licensee is subject to judicial review pursuant to Article 78 of the CPLR. New York procedural law prohibits this Court from reaching the issue of whether a determination is supported by substantial evidence, and requires that petitions involving such questions be transferred to an Appellate Division (Blanco v Popolizio, 190 AD2d 554 [lst Dept 1993]; CPLR 7804[g]). This State's Appellate Divisions have exclusive jurisdiction to review administrative determinations rendered after a statutorily mandated evidentiary hearing where the issue raised on review is whether the administrative determination is supported by substantial evidence in the record at the administrative hearing (Hunt v Grinker , 169 AD2d 477, 478 [lst Dept 1991], citing CPLR 7803[4], 7804[g], and O'Donnell v Rozzi, 99 AD2d 494 [2d Dept 1984]).

A question of 'substantial evidence", as specified in CPLR 7803(4), arises only where a quasi-judicial hearing has been held and evidence taken pursuant to law (Bonded Concrete, Inc. v Town Bd. Of Town of Rotterdam, 176 AD2d 1137, 1138 [3d Dept 1991]; see, CPLR 7803[4]). In order for the hearing

to fall within section 7803(4), it must be conducted in accordance with the procedural requirements of article 3 of the State Administrative Procedure Act (Bonded Conc:rete, Inc. v Town Bd. Of Town of Rotterdam, supra). This petitioner has a right to invoke the substantial evidence portion of CPLR 7803(4) because section 441-e(2) of the Real Property Law requires that petitioner be given written notice of charges and an opportunity to be heard at a hearing prior to revocation of her real estate broker's license pursuant to section 441-c of the Real Property Law (Kostika v Cuomo, 41 NY2d 673 [1977]) .

However, transfer to an Appellate Division is not automatic even in instances where a petitioner has a hearing which comes under the purview of CPLR 7803(4). In order to trigger the transfer requirement of CPLR 7804(g), a petitioner must actually raise a substantial evidence question by challenging the sufficiency of the factual basis underlying the hearing officer's determination (Hudson River Fisherman's Assn. V Williams, 139 AD2d 234, 237 [3d Dept 1985]; see, Matter of Concourse Ophthalmology Assoc., P.C . , 60 NY2d 734, 736 [1983]). In contrast, a petition which only presents a question of law does not raise a substantial evidence claim and does not require transfer to the Appellate Division (Bahouth v Sardino, 125 AD2d 990 [4th Dept 1986]). Examples of question of law include challenges to an agency's specific application of broad statutory terms (Harris v Lavine, 43 AD2d 894 [4th Dept 1974]) and due process claims such as improper or vague notice and demands for pretrial discovery (Bahouth v Sardino, supra).

Petitioner's claim that the license requirements for AIVs violate various Amendments to the Federal Constitution and her argument that the imposition of AIV statutes into the requirements for real estate broker's license under section 441-c of the Real Property Law represents a violation of her constitutionally protected right to free speech, do not simply

involve matters of law. Instead, an analysis of these claims involves issues of fact which directly raises the question of whether the ALJ's determination was based on substantial evidence. For example, in order to determine whether the ALJ correctly applied the statutes governing AIVs to the present situation, this court would need to review the evidence submitted at the hearing to see if petitioner's business shared sufficient characteristics with an AIV to trigger the requirements of Article 12-c of the Real Property Law. Petitioner's argument that ALJ's penalty was unreasonable and harsh would also require a review of the underlying factual circumstances, warranting a transfer to the Appellate Division (Kostika v Cuomo, supra, 41 NY2d, at 673; see, Dippell v Hammons, 246 AD2d 450 [lst Dept], lv denied 92 NY2d 801 [1998]).

Since the petition raises both issues of fact and law, this court lacks jurisdiction to reach the underlying merits of the petitioner's claims and the entire proceeding must be transferred to the Appellate Division, First Department (Mistler v Tofany, 39 AD2d 710 [2d Dept], affd 30 NY2d 870 [1972]; CPLR 7804[g]). Respondent's cross-motion to submit further documentation, including a memorandum of law, is denied as moot.

Accordingly, it is

ADJUDGED that respondent's cross motion to transfer this matter is granted; all other branches of the cross motion are denied as moot; and it is further

ORDERED that the application by petitioner seeking to vacate and annul a determination by respondent is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804 (g). This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence

was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence (CPLR 7804[4]).

The Clerk of the Court is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this order with notice of entry.

This constitutes the order and judgment of the court.

DATED: December 3 , 2001

/s/ PAULA J. OMANSKY
PAULA J. OMANSKY
J.S.C.

APPENDIX D

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF THE SECRETARY OF STATE

ADMINISTRATIVE APPEAL
1 DOS APP .01

----------X

LAN LAN WANG,

Appellant,

-against-

DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,

Respondent

----------X

DECISION AND ORDER

The Appellant, Ms. Lan Lan Wang, appeals to the Secretary of State from a Decision of the Office of Administrative Hearings (OAH). The decision suspended Ms. Wang's license as a real estate broker pending cessation of her operation of an unlicensed apartment information vendor (AIV) business.

The Appellant submitted two Memoranda of Law objecting to the Decision.

The Respondent Division of Licensing Services (DLS) submitted a Memorandum in Opposition to the Appeal.

ISSUES

This Appeal considers: (1) wheterh OAH has jurisdiction to determine the constitutionality of the apartment information vendor statute (NY Real Property Law, Article 12-C); (2) whether OAH erred when it determined that the Department of State may suspend a real estate broker's license for activities unrelated to the real estate license itself; and (3) whether OAH erred when it determined that the Appellant's conduct of an unlicensed AIV business constitutes "untrustworthiness or incompetency" such as to justify suspension of her real estate broker's license under NY Real Property Law, §441-c.

SUMMARY OF THE EVIDENCE

In deciding this Appeal the following documents were considered:

(A) Pleadings, consisting of a Notice of Hearing, the Appellant's Memoranda of Law, and the Respondent's Memorandum in Opposition.

(B) The Hearing Transcript and related exhibits, and the Decision.

(C) Real Property Law (RPL), Article 12-A ("Real Estate Brokers and Real Estate Salesmen") and Article 12-C ("Apartment Information Vendors").

FINDINGS OF FACT

The findings of fact of the Office of Administrative Hearings are adopted for the purposes of this appeal.

OPINION AND CONCLUSIONS OF LAW

(1)The authorities cited in the Decision support the conclusion that the Office of Administrative Hearings has no

jurisdiction to determine the constitutionality of the apartment information vendor statute. *Cherry v. Brumbaugh, 355 AD 880, 7 NYS 2d 956 (2nd Dept., 1938).*

(2) The Department of State may suspend a real estate broker's license for activities unrelated to the real estate license itself. *Fogel v. Dept of State, 209 AD 2d 615, 619 NYS 2d 104 (2nd Dept. 1994).*

(3) The Office of Administrative Hearings determined that Appellant did conduct an unlicensed apartment information vendor business that violated GBL *446-b and thereby demonstrated untrustworthiness or incompetence as a real estate broker which justified suspension of her real estate broker's license. Violation of a regulatory requirement unrelated to a broker's license has been held to present grounds for finding of "untrustworthiness or incompetency." Smith v. Paterson. 88 AD 2d 917, 450 NYS 2d 577 (2nd Dept., 1982).

A careful review of the entire record reveals that since late 1996, when first contacted by Division of Licensing Services investigators concerning her failure to obtain a license as an apartment information vendor, the Appellant has steadfastly refused to comply with the requirements of Real Property Law (RPL) *446-b. She has been repeatedly requested to do by the Division of Licensing Services. That she is selling access to listings of apartments which are available for rent is crystal clear despite her attempts to characterize it otherwise. The language of the statute is clear and unambiguous and she has adamantly refused to comply with it. Appellant's argument that the legislature should amend or otherwise modify the statute so as to exempt her on-line business from its requirements is neither relevant nor grounds to excuse compliance with a statute, like it or not, now in effect. Her argument that as an on-line business, it

would be impossible to comply with the current requirements of the statute, is similarly unavailing.

Appellant is an intelligent and well-educated person. Her knowing and persistent refusal to comply with the law, however, indicates an unreliability that cannot be ignored. The requirements of Article 12-C of the Real Property Law are not to be cavalierly ignored by Appellant or others by simply claiming the law does not apply to them.

Therefore, in exercising my discretion in this matter, I determine that the sanction imposed by the Office of Administrative Hearings is appropriate and that it is not disproportionate to the proven allegations of the complaint.

DETERMINATION

The Decision of the Administrative Law Judge is upheld. The Division of Licensing Services is ordered to suspend the Appellant's real estate license forthwith.

/s/ ALEXANDER F. TREADWELL
ALEXANDER F. TREADWELL
Secretary of State

January 4, 2001

APPENDIX E

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

23 DOS 00

----------X

In the Matter of the Complaint of

DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES

Complainant, DECISION

-against-

LAN LAN WANG,

Respondent.

----------X

The above noted matter came on for hearing before the undersigned, Roger Schneier, on July 27, 1999 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent was represented by Litigation Counsel Laurence Soronen, Esq.

COMPLAINT

The complaint alleges that the respondent, a licensed real estate broker, has engaged in the business of Apartment Information Vendor without being licensed to do so.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the compalint was served on the respondent by certified mail (State's Ex. 1).

2) The respondent has been licensed as a real estate broker representing Principal Connections Limited, 444 Park Avenue South, New York, New York, since at least December 6, 1994. Neither she, the corporation, nor any of the other business entities through which she conducts or has conducted business, are, or have ever been, licensed as an Apartment Information Vendor (State's Ex. 1).

3) In or about 1996 the respondent commenced operation of "Manhattan Listing Xpress," aka "Homeline." In return for a registration fee of $175 consumers would receive, for a period of three months, listings of apartments which were available for rent in various New York City locations (States's Ex. 2, 3, and 4). All contacts between Manhattan Listing Express/Homeline and its customers were either in person, by voice or fax telephone, or by mail.

4) At some point the respondent ceased doing business in the above manner, and transferred her entire operation to the internet, using among others, the names "Metro List Xpress" and "MLX."

When consumers access the respondent's web site they are offered, without fee, the opportunity to obtain information about various aspects of the real estate business in New York City, about taxes, and about moving, to receive discounts from certain non-affiliated businesses, to participate in an on-line bulletin board, and to access a data base of apartments which are available for rent or sale. The data base describes the apartments which are available for rent, but does not give their addresses or otherwise indicate how to contact the landlords. By paying a fee of $150.00 the

consumer receives on-line access to the addresses of and contact information for the rental apartments, as well as increased discounts from the non-affiliated businesses (State's Ex. 1, 6, and 7, Resp. Ex. B).

5) Attached hereto, and made a part hereof, is a copy of the respondent's proposed findings of fact with my comments noted thereon.

OPINION

I - Pursuant to Real Property Law (RPL) §446-b, no person may act or engage in the business as an apartment information vendor in this state without first having obtained a license from the secretary of state." An "apartment information vendor" is

> "any person who engages in the business of claiming, demanding, charging, receiving, collecting, or contracting for the collection of, a fee from a customer for furnishing information concerning the location and availability of real property, including apartment housing, which may be leased, rented, shared or sublet as a private dwelling, abode, or place of residence." RPL §446-a[2].

An "advance fee" is

> "any fee claimed, demanded, charged, received or collected from a customer before the customer has leased or rented a private dwelling, abode or place of residence through the information provided by an apartment information vendor." RPL §446-a[3].

Nowhere in the statute is there any limitation of coverage to persons who supply information by a particular means,

such as in person or in writing, or an exemption from coverage for persons who supply information by some other means, such as electronic. Nor is there any exemption for licensed Real Estate Brokers.

> "While it is true that prior to the enactment of the apartment information vendor law some courts held that such activities required licensure as a real estate broker (*People v. Biss*, 81 Misc2d 449, 36S NYS2d 983 (1975), *People v Sickinger*, 79 Misc2d 572, 360 NYS2d 796 (1974)), it is also true that with the enactment of the statute the law changed.
>
> "When the Legislature enacted the apartment information vendor law, it carved out for special attention an area of the real estate business in which it decided that the public required special prosecution, and imposed on licensees special requirements above and beyond those placed on real estate brokers. Accordingly, unlike in the practice of real estate brokerage, apartment information vendors must establish special interest bearing trust accounts in the minimum amount of five thousand dollars {RPL §446-b[6], are required to use specially approved contracts {RPL §446-c[1]), may be required to file quarterly reports with the Secretary of State {RPL §446-c[4]}, may not retain more than fifteen dollars of any advance fee when a rental has not been effectuated {RPL §446-c[5] [a], and are forbidden to charge a fee in excess of one month's rent {RPL §446-c[5] [a], and are forbidden to charge a fee in excess of one month's rent {RPL §446-c[5] [b]." *Division of Licensing Services v. McDermott*, 318 DOS 97.

The respondent's operation of Manhattan Listing Xpress/Homeline clearly fell within the statutory definition of "Apartment Information Vendor." Put simply, she sold listings of apartments which were available for rent. While in her current on-line business she has modified her operation somewhat, the essence of the business remains the same. For a fee she provides her customers with information as to the location and availability of apartments which may be rented. Although she also provides other information and makes available certain discounts from unrelated businesses, but most of that information and of those discounts is available without charge, and the essence of the service for which her customers are paying is the access to the apartment listings.

Unlike a newspaper, in which the reporting of news is the primary function and apartment rental advertisements, placed by a landlord or broker for a fee, are only a secondary function, the primary function of the respondent's business, and the source of her revenues, is the sale of access to listings of apartments which are available for rent. See *Lefkowitz v. Harrell's Employment Guide, Inc.* 89 Misc. 2d 807, 392 NYS2d 529 (Albany County Supreme Court, 1977). The fact that her service is electronic and interactive, or that she refers to it as a "portal," in no way changes the essence of what she is selling. Nor does the fact that the apartment information is in data base form rather than in a written list, a change of form rather than of substance, exempt from the coverage of the statute.

II - The respondent seeks to be exempted from coverage by the statute by arguing that the intent of the Legislature and Governor was that it should apply to written lists. Setting aside the fact that is unlikely that at the time of the enactment of the statute the Legislature and Governor could have anticipated the availability of the internet, and the fact

that the apartment availability information supplied by the respondent is nothing more or less than a customized list in electronic form, the respondent's resort to an analysis of legislative intent is misplaced. Inasmuch as the language of the statute is clear and unambiguous, its words should be given their plain meaning. *Matter of State v. Ford Motor Co.*, 74 NY2d 495, 549 (NYS2d 360 (1989). The respondent is engaged in just the type of conduct which the statute was designed to regulate: the sale of listings of apartments available for rent. Thus, this is not a situation in which the application of the above principal will result in an unreasonable or absurd result. *Williams v. Williams,* 23 NY2d 592, 298 NYS 2d 473 (1969).

While the respondent may not have engaged in any of the fradulent and harmful conduct which the statute seeks to prevent, it is illogical to argue that she should, therefore, be exempt from licensure. One need not demonstrate a dishonest nature before being required to be licensed. If such were the requirement, no licenses would be issued to dishonest persons, GBL §446-b(1), and honest persons wouldn't need them.

III - The respondent argues that licensure should not be required because certain aspects of the statute and of the regulations enacted pursuant to the statute are absurd when considered in regards to the nature of an internet operation. That argument is premature, and can be properly made only after the respondent obtains a license.

IV - The respondent contends that an exemption from coverage by the statute has been granted to a service known as "Apartment Store," which according to the respondent, claims to be a credit service which provides apartment listings as an ancillary service, and that such exemption should apply to her. In fact, charges where brought against the licensed real estate broker who operates that business, a

hearing has been held before this tribunal, and the matter is currently *sub judice.*

V - The respondent seeks to have this tribunal rule on the constitutionality of the statute. The tribunal lacks the authority to do so. *Cherry v. Brumbaugh,* 255 AD 880, 7 NYS2d 956 (App. Div. 2nd. Dept., 1938); *Richardson v. Tennessee Board of Dentistry,* 913 SW2d 446 (Sup. Ct., Tennessee, 1935).

CONCLUSIONS OF LAW

By operating an unlicensed Apartment Information Vendor business the respondent violated GBL §446-b, and thereby demonstrated untrustworthiness and incompetence as a Real Estate Broker.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Lan Lan Wang has demonstrated untrustworthiness and incompetence, and accordingly, pursuant to Real Property Law §441-c her license as a Real Estate Broker is suspended effective April 1, 2000 until such time as she has presented proof satisfactory to the Department of State that she, either directly or indirectly or through any business controlled by her, is no longer engaged in the business of Apartment Information Vendor as defined by General Business Law §446-a[2]. The respondent is directed to send such proof, or her license certificate and pocket card to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

/s/ ROGER SCHNEIER
ROGER SCHNEIER
Administrative Law Judge

Dated: January 31, 2000

APPENDIX F

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article 12-A of New York Real Property Law provides in pertinent part:

§ 441-c. Revocation and suspension of licenses. 1. Powers of department. (a) The department of state may revoke the license of a real estate broker or salesman or suspend the same, for such period as the department may deem proper, or in lieu thereof may impose a fine not exceeding one thousand dollars payable to the department of state, or a reprimand upon conviction of the licensee of a violation of any provision of this article, or for a material misstatement in the application for such license, or if such licensee has been guilty of fraud or fraudulent practices, or for dishonest or misleading advertising, or has demonstrated untrustworthiness or incompetency to act as a real estate broker or salesman, as the case may be.

2. Article 12-C of New York Real Property Law provides in pertinent part:

ARTICLE 12-C
APARTMENT INFORMATION VENDORS

§ 446-a. Definitions. As used in this article, unless the context otherwise requires: 1. "Person" means any natural person, corporation, limited liability company, partnership, firm, or association.

2. "Apartment information vendor" means any person who engages in the business of claiming, demanding, charging, receiving, collecting, or contracting for the collection of, a fee from a customer for furnishing information concerning the location and availability of real

property, including apartment housing, which may be leased, rented, shared or sublet as a private dwelling, abode, or place of residence. The definition of apartment information vendor shall include an apartment sharing agent which means any person who, for a fee, arranges, conducts, coordinates, handles or causes meetings between a customer and the current owner or occupant of legally occupied real property, including apartment housing, who wishes to share that housing with one or more individuals as a private dwelling, abode or place of residence, but it shall not apply to any person who for another and for a fee, commission or other valuable consideration, supervises, organizes, arranges, coordinates, handles or is otherwise in charge of or responsible for the relocation of commercial or residential tenants from buildings or structures that are to be demolished, rehabilitated, remodeled or otherwise structurally altered.

3. "Advance fee" means any fee claimed, demanded, charged, received or collected from a customer before the customer has leased or rented a private dwelling, abode or place of residence through the information provided by an apartment information vendor.

§ 446-b. License required. 1. It is unlawful for any person to act or engage in the business as an apartment information vendor in this state without first having obtained a license from the secretary of state. No person shall be granted a license until he has established that he is trustworthy and bears a reputation for good and fair dealing.

* * * *

§ 446-c. Contracts; fees; reporting procedures. 1. Every apartment information vendor licensed under this article shall furnish customers with a contract prepared on a form approved by the Secretary of State. Such contract shall include in plain language form a statement setting forth the sources of information concerning the location and

availability of real property, including apartment housing, which may be leased, rented, shared or sublet as a private dwelling, abode, or place of residence.

1-a. Each listing of real property furnished by the apartment information vendor shall cite the source of information for each property in plain language form, provided, however, that the failure to provide such information shall not constitute a violation of this article but shall be grounds for license suspension pursuant to §446-e of this article.

2. No apartment information vendor shall claim, demand, charge, receive, collect or contract for an advance fee from a customer except as set forth in subdivision five of this section. In no event shall the fee charged to the customer or legal occupant exceed one month's rent.

3. Notwithstanding the above, an apartment information vendor may at any time accept a fee from the current legal occupant of real property including apartment housing available to share or sublet.

4. Each apartment information vendor shall file a quarterly report with the secretary containing such information as the secretary may require.

5. (a) An apartment information vendor may retain not more than $15 dollars out of any advance fee for administrative services. The balance of any advance fee shall be placed in an account similar to that required by subdivision 6 of §446-b of this article, except that it need not be interest bearing and moneys from such account may be withdrawn as provided in paragraph (b) of this subdivision. The balance of the advance fee shall continue to be the property of the person paying the advance fee and shall be held in trust by the apartment information vendor. Such balance may be mingled with other moneys in such account and any interest thereon shall be the property of the apartment information vendor. Such vendor shall notify in

writing each person paying an advance fee giving the name and address of the banking organization in which the advance fee is deposited.

(b) If the customer pays an advance fee, the contract with the apartment information vendor shall contain a provision stating that the customer may, under the circumstances set forth in this paragraph, recover his advance fee less the amount deducted for administrative services. The vendor shall be entitled to his fee when a customer has leased or rented a private dwelling, abode or place of residence through the information provided by the vendor. Within 10 days of the receipt by the apartment information vendor of written notice stating that the customer paying an advance fee has not leased or rented a private dwelling, abode or place of residence through the information supplied by the vendor and does not intend to rent any such private dwelling, abode or place of residence, the vendor shall refund the advance fee, less the fee for administrative services, to such customer. The vendor shall also be required to refund any portion of the advance fee in excess of one month's rent to a customer who has leased or rented a private dwelling, abode or place of residence through the information supplied by the vendor.

(c) Notwithstanding anything in this subdivision 5 to the contrary, if the services to be rendered by the apartment information vendor to a particular customer relate exclusively to acting as an apartment sharing agent, the vendor may retain the full advance fee, whether or not the customer leases or rents a private dwelling, abode or place of residence through the information provided by the vendor, and the provisions of paragraphs (a) and (b) of this subdivision five shall not be applicable to such transaction.

* * * *

§ 446-h. Violations. 1. Misdemeanors. Any person, firm or corporation violating any provision of this article shall be

guilty of a misdemeanor. The commission of a single act prohibited by this article shall constitute a violation hereof.

2. Criminal actions for violations of this article shall be prosecuted by the attorney general, or his deputy, in the name of the people of the state, and in any such prosecution the attorney general, or his deputy, shall exercise all the powers and perform all the duties which the district attorney would otherwise be authorized to exercise or to perform therein. The attorney general shall, upon a conviction for a violation of any provision of this article, and within ten days thereafter, make and file with the secretary a detailed report showing the date of such conviction, the name of the person convicted and the exact nature of the charge.

3. In case the offender shall have received any sum of money as compensation or profit by or in consequence of his violation of any provision of this article, he shall also be liable to a penalty of not less than the amount of the sum of money received by him as such compensation or profit and not more than four times the sum so received by him, as may be determined by the court, which penalty may be sued for and recovered by any person aggrieved and for his use and benefit, in any court of competent jurisdiction.

4. The secretary shall have the power to enforce the provisions of this article and upon complaint of any person, or on his own initiative, to investigate the business, business practices and business methods of any person, firm or corporation applying for or holding a license as an apartment information vendor, if in his opinion such investigation is warranted. Each such applicant or licensee shall be obliged, on request of the secretary to supply such information as may be required concerning his or its business, business practices or business methods, or proposed business practices or methods.

5. For the purpose of enforcing the provisions of this article and in making investigations relating to any violation

thereof, and for the purpose of investigating the character, competency and integrity of the applicants or licensees hereunder, and for the purpose of investigating the business, business practices and business methods of any applicant or licensee, or of the officers or agents thereof, the secretary shall have the power to subpoena and bring before the officer or person so designated any person in this state and require the production of any books or papers which he deems relevant to the inquiry and administer an oath to and take testimony of any person or cause his deposition to be taken with the same fees and mileage and in the same manner as prescribed by law for civil cases in a court of record, except that any applicant or licensee or officer or agent thereof shall not be entitled to such fees and/or mileage. Any person, duly subpoenaed, who fails to obey such subpoena without reasonable cause or without such cause refuses to be examined or to answer any legal or pertinent question as to the character or qualification of such applicant or licensee or such applicant`s or licensee`s business, business practices and methods or such violations, shall be guilty of a misdemeanor.

6. In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before the department of state for a violation of any of the provisions of this section, the court, magistrate or grand jury, or the secretary of state, his deputy or other officer conducting the investigation, may confer immunity, in accordance with the provisions of the criminal procedure law.

§ 446-i. Rules and regulations. The secretary may enact rules and regulations necessary to accomplish the purposes of this article.

3. N.Y. Comp. Codes R. & Regs. tit. 19, § 190.8 provides, "No apartment information vendor shall place any advertisements or specific apartments. Advertisements shall be limited to the vendor's name, address, telephone number and business hours, and a description of the services offered."

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 9425 (RWS)

LAN LAN WANG AND
PRINCIPAL CONNECTIONS, LTD., D/B/A/ MLX.COM,
PLAINTIFFS,

v.

GEORGE E. PATAKI, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEW YORK, AND ELIOT SPITZER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, DEFENDANTS.

October 5, 2001

OPINION

SWEET, D.J.

The defendants George E. Pataki, in his official capacity as Governor of the State of New York (the "Governor"), and Eliot Spitzer, in his official capacity as Attorney General of the State of New York (the "Attorney General"), (collectively, "the State"), have moved under Rule 12(b)6, Fed. R. Civ. P., to dismiss the complaint of plaintiffs Lan Lan Wang ("Wang") and Principal Connections, Ltd., d/b/a MLX.COM ("MLX.Com"). For the reasons set forth below, the complaint is dismissed as to the Governor and a Pullman abstention is granted.

The propriety of the action undertaken by the Secretary of State to enforce the State's statutes by way of cancellation of Wang's real estate broker's license is peculiarly a state issue as is the application of the statute to an internet site. Since these issues are squarely before the State Court and may obviate any constitutional questions, Pullman abstention is appropriate.

Prior Proceedings

Wang and Principal Connections filed their complaint on December 12, 2000 (the "Complaint"). The complaint alleges that Principal Connection is a New York corporation and Wang is a New York resident and an officer, director and shareholder of Principal Connections.

According to the Complaint, in 1995 MLX.Com developed a website which provided a visitor, an unregistered user, or a subscriber to the website with access to a portal of information concerning residential apartment listings in New York and New Jersey.

The Complaint alleges that on February 12, 1999, the Secretary of State of the State of New York commenced an administrative proceeding against Wang contending that by operating the website without a license in accordance with Real Property Law Article 12-C, §§ 446-a, et seq., the Apartment Information Vendors Law (the "AIV"), Wang breached her duties as a licensed real estate broker and that on January 31, 2000 an order was issued suspending her license as a real estate broker. The Complaint alleges that the AIV constitutes an unconstitutional statutory scheme requiring an "Apartment Information Vendor" to be registered, to obtain a license, to provide a contract for a customer setting forth the source of information conveyed, and to comply with a provision concerning any fees charged, and providing that any violation of the act constitutes a misdemeanor.

The Complaint also describes the nature and operation of the internet and the methods by which the information on the Web Site is made available.

The Complaint alleges three causes of action: that the AIV violates the Interstate Commerce Clause, U.S. Const. Art. 1, §§ 8 & 3; that it violates the First and Fourteenth Amendments of the United States Constitution because it bans constitutionally protected speech; and that it violates the First, Fifth and Fourteenth Amendments because it is unconstitutionally vague.

The Complaint refers to a decision of January 31, 2000 by the Honorable Roger Schnier, the Administrative Law Judge (the "ALJ"), which found that Wang was a licensed real estate broker, that she founded Manhattan Listing Express in 1996 and provided listing of apartments for a fee of $ 175, that Wang commenced an internet-based business using the Web Site and that:

> When consumers access the respondent's web site they are offered, without fee, the opportunity to obtain information about various aspects of the real estate business in New York City, about taxes, and about moving, to receive discounts from certain non-affiliated businesses, to participate in an on-line bulletin board, and to access a database of apartments which are available for rent or sale. The database describes the apartments which are available for rent, but does not give their addresses or otherwise indicate how to contact the landlords. By paying a fee of $ 150.00 the consumer receives on-line access to the addresses of any contact information for the rental apartments, as well as increased discounts from the non-affiliated businesses.

The decision of the ALJ concluded that Wang was an Apartment Information Vendor, had not obtained a license and thus violated the AIV, and "thereby demonstrated untrustworthiness and incompetence as a Real Estate Broker" and suspended her license. On January 4, 2001, the Secretary of State, the Honorable Alexander F. Treadwell ("Secretary of State") upheld the ALJ's decision.

On May 7, 2001, Wang commenced an Article 78 proceeding in the Supreme Court of the State of New York, New York County, against the Secretary of State, Index No. 109389/2001 (the "Article 78 Proceeding") alleging that the ALJ's findings and conclusions were "arbitrary, capricious and improper, illegal and unconstitutional". Wang contended that the findings and conclusions of the ALJ should be dismissed because; 1) MLX.Com was not covered by the AIV, 2) internet services are not included under the AIV, 3) the enforcement of the terms of the AIV by suspension of Wang's license was improper, 4) the AIV violates the Commerce Clause and free speech rights as interpreted, 5) notice of the hearing was inadequate, and 6) the decision of the ALJ was without authority, constituted an abuse of discretion and was not supported by substantial evidence.

The motion of the Governor and the Attorney General to dismiss the Complaint or to stay the action was marked fully submitted on June 27, 2001.

The Facts

For the purposes of the instant motion, the facts as alleged in the Complaint are taken as true. See Brady v. Town of Colchester, 863 F.2d 205, 210 (2d Cir. 1988) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 330 n. 2, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (Brennan, J., dissenting)).

As set forth in the Complaint, MLX.Com provides consumers around the world with access to information

related to the residential real estate markets in New York and New Jersey via the internet through the MLX.Com site, where renters, buyers, sellers, landlords and brokers with common interests can communicate with each other about their services and needs. The services and information contained on the MLX.Com website are continuously updated.

The memorandum of law submitted to the Secretary of State on behalf of Wang stated that for a payment of $ 150, a subscriber to the website was entitled to a number of discounts, the specifics of certain apartments, the timing of access and the identification of the offeror. It further stated that MLX.Com has invested $ 2 million in technology and receives a greater portion of its income from participating brokers, and that the cost of servicing each apartment seeker is twice the $ 150 subscription fee.

The Statute

The statute which Wang and MLX.Com seek to enjoin, the AIV, was enacted in 1975 after a public hearing in response to consumer complaints about apartment information vendors who sold lists of apartments and advertised highly appealing apartments as available for low rental payments, some of which were unsuitable, unavailable and nonexistent. The AIV sought to address this problem and required, first, that apartment information vendors operating in the State of New York be licensed by the State. RPL § 446-b. To obtain a license, AIVs must demonstrate that they are trustworthy and bear a reputation for good and fair dealing, and must pay a fee of $ 400, from which the State monitors and enforces the law. Id. § 446-B(2). AIVs must place $ 5,000 in an escrow account to insure that defrauded consumers will be able to receive reimbursement and must file quarterly statements with the New York Secretary of State. Id. §§ 446-b(6), 446-e, 446-h & 446-c(4).

The Act also regulates the fees that AIVs may charge to consumers. Although an AIV may charge an advance fee, actual fees are limited to one month's rent, and may only be paid when a consumer actually obtains an apartment referred by an AIV; in the event the consumer is unsuccessful in obtaining an apartment, the AIV may retain only a $ 15 administration fee. Id. § 446-c(5). The law contains a severability clause (id. § 446-j), and directs the Secretary of State to adopt appropriate regulations, which the Secretary has published at 19 NYCRR §§ 190.1-190.8

After four years of regulating the apartment information industry, the Secretary of State held hearings on the statute, "which revealed that abuses continued to exist." Galaxy Rental Serv., Inc. v. State, 88 A.D.2d 99, 101, 452 N.Y.S.2d 921 (4th Dep't 1982). As a result, the Act was amended in 1980. The Act was amended again in 1998.

On February 12, 1999, the Secretary of State of the State of New York commenced an administrative proceeding against Wang contending that by operating the MLX.com website without a license in accordance with the AIV, Wang breached her duties as a licensed real estate broker and on January 31, 2000 an order was issued suspending her license as a real estate broker which was affirmed by the Secretary of State on January 4, 2001.

The Complaint Fails to State a Claim Against the Governor

Plaintiffs allege that the Governor "is vested with the executive power of the State of New York and is required to ensure that the laws of the State of New York are faithfully and fairly executed." These allegations are insufficient to state a claim against the Governor. The State Constitution does provide that "the executive power shall be vested in the governor" (N.Y. Const., Art IV, § 1), who "shall take care that the laws are faithfully executed." N.Y. Const. Art. IV, § 3. It does not follow, however, that the Governor is a

necessary or proper party to every suit raising a challenge to the constitutionality of a state statute. On the contrary, where the legislative enactment provides that entities other than the executive branch of the state are responsible for implementation of the statute no claim against the Governor lies. See Ex Parte Young, 209 U.S. 123, 157, 52 L. Ed. 714, 28 S. Ct. 441 (1908) ("it is plain that [a defendant state] officer must have some connection with the enforcement of the [challenged] act"); Gras v. Stevens, 415 F. Supp. 1148, 1151-52 (S.D.N.Y. 1976) (general duty of governor under the State Constitution § 3 is not sufficient to make him a necessary party to an action challenging the constitutionality of a state statute that he is not charged to enforce).

Plaintiffs fail to show that the Governor has any connection with the enforcement of the AIV other than the general duty to take care that the laws be faithfully executed. Plaintiffs' reliance on Association of Am. Med. Colleges v. Carey, 482 F. Supp. 1358 (N.D.N.Y. 1980) in support of their argument that the Governor's general executive duty is an adequate basis for liability is misplaced. As the Southern District, in criticizing Carey, recently noted, "the vast majority of courts to consider the issue have held . . . that a state official's duty to execute the laws is not enough by itself to make that official a proper party in a suit challenging a state statute." Warden v. Pataki, 35 F. Supp. 2d 354, 359 (S.D.N.Y.), aff'd, Chan v. Pataki, 201 F.3d 430 (2d Cir. 1999), cert. denied, 531 U.S. 849, 121 S. Ct. 122, 148 L. Ed. 2d 77 (2000). Since the Department of State, not the Governor, is responsible for administering the AIV, and the Attorney General, not the Governor, is responsible for enforcing its penalties, the general executive duty of the Governor does not provide a basis for a claim against him. See Gras v. Stevens, 415 F. Supp. 1148, 1151-52 (S.D.N.Y. 1976).

Pullman Abstention is Appropriate

The Pullman doctrine permits this Court to abstain until the New York Courts resolve questions of state law upon which the Constitutional adjudication will depend. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941).

Under Pullman, abstention may be appropriate in this Circuit when (1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible "to an interpretation by a state court that would avoid or modify the federal constitutional issue." Greater New York Metro. Food Council v. McGuire, 6 F.3d 75, 77 (2d Cir. 1993). This case satisfies all three requirements for Pullman abstention.

The plaintiffs here have argued that the AIV violates the Commerce Clause and the First Amendment because it places unreasonable burdens on their internet business. To determine the extent of that burden will require an interpretation of state law and a determination not only whether the AIV applies to the business of Wang and MLX.com, but also how the various provisions apply to an internet company.

Wang has also challenged in the State Court the applicability of the AIV to the website, maintaining that the site is not an apartment information vendor but rather a method of providing access to information, not only for New Yorkers but worldwide, a so-called "bi-directional internet platform." She also has urged that the AIV as a criminal statute should be construed narrowly, as opposed to the expansive interpretation of the ALJ maintaining that the involvement of a real estate subject matter on the internet was not grounds for the application of AIV.

Were any of these grounds to be successful in the State Court, the constitutional issues, also raised in the Article 78 Proceeding, would be obviated. A the State Court may determine that the AIV does not apply to a person who sells information concerning the availability of New York apartments via the internet, and the extent of the particular requirements of the AIV apply to such a person might dispose of the constitutional issues raised here. See Tunick v. Safir, 209 F.3d 67, 75 (2d Cir. 2000) (stating that "opacity notwithstanding", deferral is only appropriate where a single adjudication in state court could eliminate the constitutional difficulties).[1]

Wang and MLX.Com also contend that their challenge to the AIV as facially invalid on constitutional grounds cannot be resolved by the Article 78 Proceeding, citing CECOS Intern., Inc. v. Jorling, 895 F.2d 66 (2d Cir. 1990) ("CECOS"). However, CECOS concluded that facial constitutional issues could be reached in the State Court setting:

> Further, where all the necessary parties are present before Special Term, it [the Article 78 Proceeding] may test the constitutionality of the statute itself by treating the Article 78 petition challenging the statute on it face as a declaratory judgment action. Kovarsky v. Housing & Development Administration], 31 N.Y.2d [184] at 192, 335 N.Y.S.2d 383, 286 N.E.2d 882. Lakeland Water Dist. v. Onondaga County Water Auth., 24 N.Y.2d 400, 408-09, 301 N.Y.S.2d 1, 248 N.E.2d 855

---

[1] This action is particularly appropriate for abstention because of the oblique effort of the Secretary of State to enforce the AIV. Rather than a direct action against Wang and MLX.Com for violating the AIV, the Secretary determined that Wang had violated the AIV and that such violation constituted grounds for suspension of her license as a real estate broker. By her Article 78 Proceeding, Wang has challenged this procedure and the propriety of such grounds for license revocation.

> (1969). In light of this, we cannot assume that New York's procedures are inadequate to provide plaintiff a forum to review its constitutional claims. See University Club [v. New York], 842 F.2d [37] at 40 [(2d Cir. N.Y. 1988)] (adequate opportunity to raise constitutional claims in judicial review of administrative action). Hence, contrary to the district court's conclusion, the question of opportunity for judicial review should be answered in the affirmative.

The State is clearly present in the Article 78 Proceeding and, therefore, MLX.Com is the only missing party, whose interests are identical to those of Wang. Should the Court choose to do so, a declaratory judgment cause could be added to the present state proceeding. The Second Circuit, dealing with a Younger abstention based on an Article 78 Proceeding challenging the suspension of a license to practice dentistry, affirmed the abstention, stating:

> The Supreme Court has clearly held that a would-be plaintiff who has been subjected to a state proceeding which he seeks to challenge in federal court must first exhaust all available state appellate remedies -- unless, of course, an exception to Younger applies or other Younger prerequisites are not met. See Huffman v. Pursue, Ltd., 420 U.S. 592, 608, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975). ... The language of Huffman indicates that the question whether the state's procedural remedies could provide the relief sought does not turn on whether the state will provide the relief sought by the plaintiff before the federal court. Kirschner has made no showing that the State's laws, procedures, or practices

> would prevent his effective interposition of his federal contentions.

Kirschner v. Klemons, 225 F.3d 227 (2d Cir. 2000).

Since the AIV is susceptible to an interpretation by a state court that would avoid constitutional adjudication and the currently pending state court proceedings are adequate to address the issue, a Pullman abstention is warranted.

Conclusion

The complaint is dismissed as to the Governor. The motion for Pullman abstention is granted, and the action is stayed pending resolution of the State proceeding.

It is so ordered.

New York, NY
October 5, 2001

ROBERT W. SWEET
U.S.D.J.